Hassnar bin MP Ebrahim @ Asainar v Sulaiman bin Pong & Ors

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COURT OF APPEAL (KOTA KINABALU) — CIVIL APPEAL NO S-01(W)-336–10 OF 2015
DAVID WONG, ABANG ISKANDAR AND ZAMANI A RAHIM JJCA
14 JULY 2017

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Civil Procedure — Trial — Findings of fact — Whether trial court made correct findings of facts on evidence adduced and came to sound decision — Whether appellate court had no reason to disturb factual findings and judgment of trial court

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The third and fourth respondents ('the plaintiffs') had sued the appellant ('Hassnar') in the High Court to recover possession of their land ('the land') which was occupied by Hassnar. They also sought damages against Hassnar for committing trespass on the land. The land was transferred to the plaintiffs by the second respondent ('Chan') to whom the sixth respondent had re-alienated the land after the first respondent ('SP') — to whom the land was first alienated — surrendered the land back to the state government when he could not fulfill the conditions upon which the land was alienated to him, namely, to plant the land with oil palm within three years from the date the land was offered to him. SP had affirmed a statutory declaration ('SD') explaining why he was surrendering the land back to the state government. In the suit brought against him by the plaintiffs, Hassnar denied that he was a trespasser and raised a counterclaim against all the respondents stating, inter alia, that he had bought the land from SP after paying the purchase price, that the SD was a forgery and that all the respondents had colluded or conspired amongst themselves to defraud him or defeat his legal and beneficial rights and interest in the land. The High Court allowed the plaintiffs' claim and dismissed Hassnar's counterclaim. The instant appeal was against the dismissal of the counterclaim.

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Held, dismissing the appeal and affirming the decision of the High Court:

(1) Once the letter of offer for the land was surrendered back by SP, it was entirely left to the discretion of the sixth respondent to alienate the said land. Subject to the directions of the Minister, only the sixth respondent had the discretion to alienate state land and no one else as envisaged by s 9 of the Sabah Land Ordinance. There was no merit in Hassnar's complaint on this score (see para 17).

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(2) The SD was made to explain the fact that SP had lost the original letter of offer. Hassnar had objected to the SD and claimed that the original letter of offer was not lost. But on the evidence before him, the trial judge found that Hassnar had not led any evidence to prove that the original

letter of offer was not lost. There was no affidavit by Hassnar to rebut SP's SD. The trial judge also found as a fact that SP had lawfully surrendered back his letter of offer. This was based on the documentary and oral evidence, particularly that of SD12 who had attested the SD of SP in his capacity as second class magistrate. SD12 was at the material time a district officer. There was no reason to disturb the findings of the trial judge as it was backed by both oral and documentary evidence (see paras 18–19).

(3) Hassnar had claimed that he had purchased the letter of offer from SP via a sale and purchase agreement. He had told the trial court that he would produce the agreement as evidence but he never did. Neither did Hassnar call SP as a witness to confirm that indeed such a transaction took place. As to the allegation of collusion and conspiracy to defraud, there was a dearth of evidence from Hassnar to establish that factual circumstance. In the end, it remained a mere allegation without more. Hassnar failed to prove the serious allegations of fraud and conspiracy to defraud on balance of probabilities. His allegations on that score were altogether frivolous and without merit (see para 20).

(4) Hassnar had no legal or beneficial interest in the land and, therefore, had no locus standi to maintain his counterclaim against the respondents. SP was never a registered owner of the land and therefore had no title to pass to Hassnar. In fact, in the letter of offer given to SP, it was stated as a condition that even after the land grant in respect of the land was issued and registered in SP's name, he was prohibited from dealing with the land in any way. Nothing that purported to transfer any title — legal or beneficial — to Hassnar could in law materialise (see paras 22, 24 & 26).

(5) The trial court was right to hold that Hassnar's counterclaim was time-barred. Under items 73 and 74 of the Sabah Limitation Ordinance, the limitation period was three years. Hassnar ought to have filed his action within three years from the time he first realised that his purported right over the land had been threatened. His lodgement of the first caveat in 2003 was strong evidence pointing in that direction. But since he only prosecuted his right over the land in 2013, he was caught by limitation (see para 27).

(6) In awarding aggravated damages against Hassnar for the trespass committed by him, the trial judge had taken into account Hassnar's unjustifiable conduct in occupying the land despite knowing that he did not own it and did not have the permission of the landowners to occupy the land. This court was not inclined to disagree with the trial judge for making the award for aggravated damages. There was also no reason to disturb any of the findings of facts the trial judge had made in the course of coming to his decision (see paras 28–30).

[Bahasa Malaysia summary

Responden-responden ketiga dan keempat ('plaintif-plaintif') telah menyaman perayu ('Hassnar') di Mahkamah Tinggi untuk mendapat semula milikan tanah mereka ('tanah tersebut') yang didiami oleh Hassnar. Mereka juga memohon ganti rugi terhadap Hassnar kerana melakukan pencerobohan ke atas tanah tersebut. Tanah tersebut telah dipindah milik kepada plaintif-plaintif oleh responden kedua ('Chan') yang mana responden keenam telah memberi milik tanah tersebut selepas responden pertama ('SP') — yang mana tanah tersebut telah mula-mula diberimilik — menyerahkan semula tanah tersebut kepada kerajaan negeri apabila dia tidak dapat memenuhi syarat-syarat tanah tersebut diberi milik kepadanya, iaitu, untuk menanam kelapa sawit atas tanah tersebut dalam tempoh tiga tahun dari tarikh tanah tersebut ditawarkan kepadanya. SP telah mengesahkan dalam deklarasi statutori ('DS') menjelaskan kenapa dia menyerahkan semula tanah tersebut kepada kerajaan negeri. Dalam guaman yang dimulakan terhadapnya oleh plaintif-plaintif, Hassnar menafikan bahawa dia penceroboh dan menimbulkan tuntutan balas terhadap semula responden-responden dengan menyatakan, antara lain, bahawa dia telah membeli tanah itu daripada SP selepas membayar harga belian, bahawa DS itu adalah palsu dan bahawa kesemua responden-responden telah berpakat secara sulit atau berkonspirasi antara mereka untuk menipunya atau melupuskan hak dan kepentingan perundangan dan benefisialnya atas tanah tersebut. Mahkamah Tinggi telah membenarkan tuntutan plaintif-plaintif dan menolak tuntutan balas Hassnar. Rayuan ini adalah terhadap penolakan tuntutan balas itu.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Setelah surat tawaran untuk tanah itu diserahkan semula oleh SP, ia adalah budi bicara penuh responden keenam untuk memberi milik tanah tersebut. Tertakluk kepada arahan Menteri, hanya responden keenam mempunyai budi bicara untuk memberikan tanah negeri itu dan tiada sesiapa yang lain sepertimana termaktub dalam s 9 Ordinan Tanah Sabah. Tiada merit dalam aduan Hassnar berhubung perkara ini (lihat perenggan 17).

(2) DS tersebut dibuat untuk menjelaskan fakta bahawa SP telah hilang surat tawaran asal. Hassnar telah membantah terhadap DS tersebut dan mendakwa bahawa surat tawaran asal itu tidak hilang. Namun begitu berdasarkan keterangan di hadapannya, hakim perbicaraan mendapati Hassnar tidak mengemukakan apa-apa keterangan untuk membuktikan surat tawaran asal itu tidak hilang. Tiada afidavit oleh Hassnar untuk mematahkan DS tersebut oleh SP itu. Hakim perbicaraan juga mendapati pada hakikatnya bahawa SP telah secara sah menyerah semula surat tawarannya. Ini adalah berdasarkan keterangan dokumentar dan

lisan, terutamaya SD12 yang telah membuktikan DS tersebut oleh SP itu dalam kapasitinya sebagai majistret kelas kedua. SD12 adalah pada masa matan seorang pegawai daerah. Tiada sebab untuk mengganggu dapatan hakim perbicaraan kerana ia disokong oleh kedua-dua keterangan lisan dan dokumentar (lihat perenggan 18–19).

(3) Hassnar telah mendakwa bahawa dia telah membeli surat tawaran itu daripada SP melalui perjanjian jual beli. Dia memberitahu mahkamah perbicaraan bahawa dia akan mengemukakan perjanjian itu sebagai keterangan tetapi dia tidak berbuat demikian. Hassnar juga tidak memanggil SP sebagai saksi untuk mengesahkan bahawa sememangnya satu transaksi telah berlaku. Berhubung dakwaan pakatan sulit dan konspirasi untuk menipu, terdapat banyak kekurangan keterangan daripada Hassnar untuk membuktikan keadaan faktual tersebut. Akhirnya, ia hanya dakwaan tidak lebih daripada itu. Hassnar telah gagal membuktikan dakwaan serius berhubung fraud dan konspirasi untuk menipu atas imbangan kebarangkalian. Dakwaannya dengan itu adalah remeh dan tanpa merit (lihat perenggan 20).

(4) Hassnar tiada kepentingan perundangan atau benefisial dalam tanah tersebut. Oleh itu, tidak mempunyai locus standi untuk mengekalkan tuntutan balasnya terhadap responden-responden. SP bukan pemilik berdaftar tanah tersebut dan tidak mempunyai hak milik untuk dipindahkan kepada Hassnar. Bahkan, dalam surat tawaran yang diberikan kepada SP, ia menyatakan sebagai syarat bahawa malah selepas tanah itu diberikan di mana tanah itu dikeluarkan dan didaftarkan atas nama SP, dia dilarang daripada berurusan dengan tanah itu dalam apa cara. Tiada apa-apa dalam tujuan itu untuk memindahkan apa-apa hak milik — secara undang-undang atau benefisial — kepada Hassnar yang mana dari segi perundangan boleh berlaku (lihat perenggan 22, 24 & 26).

(5) Mahkamah perbicaraan adalah betul untuk memutuskan bahawa tuntutan balas Hassnar adalah luput had masa. Di bawah butiran-butiran 73 dan 74 Ordinan Had Masa Sabah, tempoh had masa adalah tiga tahun. Hassnar sepatutnya telah memfailkan tindakannya dalam tempoh tiga tahun dari masa dia pertama kali menyedari bahawa hak yang dikatakannya ke atas tanah tersebut tergugat. Kemasukan kaveat pertamanya pada 2003 adalah keterangan yang kukuh menunjukkan perkara tersebut. Namun begitu oleh kerana dia hanya melaksanakan haknya ke atas tanah tersebut pada 2013, dia telahpun luput hak masa (lihat perenggan 27).

(6) Dalam mengawardkan ganti rugi tambahan terhadap Hassnar untuk pencerobohan yang dilakukan olehnya, hakim perbicaraan telah mengambil kira kelakuan tidak wajar Hassnar dengan mendiami tanah tersebut meskipun mengetahui bahawa dia tidak memilikinya dan tidak

mempunyai kebenaran pemilik tanah untuk mendiami tanah tersebut. Mahkamah ini tidak bersetuju untuk tidak bersetuju dengan hakim perbicaraan untuk membuat award bagi ganti rugi tambahan. Tiada juga sebab untuk mengganggu dapatan fakta hakim pericaraan yang telah dibuat semasa beliau membuat keputusannya (lihat perenggan 28–30).]

Notes

For a case on finding of fact, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 10915.

Cases referred to

Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor [2001] 6 MLJ 497, HC (refd)
Hon Chung Lip v Kwan Ngen Wah & Ors [2012] 5 MLJ 356; [2012] 1 LNS 255, CA (refd)
Kluang Wood Products Sdn Bhd v Hong Leong Finance Bhd & Anor [1999] 1 MLJ 193, FC (refd)
Ladd v Marshall [1954] 1 WLR 1489, CA (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Lim Fong Tsin & Ors v The Assistant Collector of Land & Ors [1997] 1 LNS 7, HC (refd)
Ling Ing Keat & Ors v Martina bt Pg Ismail & Ors [2017] 2 MLJ 763; [2017] 3 CLJ 149, CA (refd)
Ludhiana Transport Syndicate & Anor v Chew Soo Lan & Anor [1979] 2 MLJ 207b, PC (refd)
Ng Ah Ba & Ors v Ramanda Sdn Bhd [1996] 1 MLJ 62, CA (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)

Legislation referred to

Rules of Court 2012 O 13 r 6
Sabah Land Ordinance (Cap 68) ss 9, 88,
Sabah Limitation Ordinance (Cap 72) Items 73, 74

Appeal from: Civil Suit No SDK-22–74/12 of 2012 (High Court, Sandakan)

Asainar @ Hassnar bin MP Ebrahim (in person) for the appellant.
Tsang Hieng Yee (Tsang & Co) for the second respondent.
Edwin Tsen (Tan Pang Tsen & Co) for the third and fourth respondents.
Mohd Ikhwan bin Ramlan (State Attorney General's Chambers) for the fifth and sixth respondents.

Abang Iskandar JCA (delivering judgment of the court):

BRIEF FACTS OF THE CASE

[1] Sometime in 1981, Sulaiman Pong ('SP'), the first defendant in counterclaim, applied for a piece of land under the Luang Manis Smallholders Scheme. The application was registered as LA 81081883.

[2] On 1 January 1982, the Director of Land and Survey, the sixth defendant in counterclaim issued a letter of offer to SP for the land known as Lot 23, Block 2 Phase 2, Luang Manis Smallholders Scheme ('the said land').

[3] On 15 February 1988, Assistant Collector of Land Revenue District of Labuk and Sugut, Sabah, the fifth defendant in counterclaim, issued a notice to SP to develop his land on or before 31 December 1988 failing which the land be reverted back to the state government.

[4] On 4 October 1988 the second defendant in the counterclaim, Chan Yee Ming applied for the land under LA 88082260.

[5] On 20 March 1989, SP made a statutory declaration ('SD') stating that he had lost his letter of offer for the said land and he surrenders the land back to the state government.

[6] On 21 March 1989, the fifth defendant in the counterclaim issued a letter recommending to the Director of Land and Survey, the sixth defendant that Chan Yee Ming be offered the land since SP had surrendered the said land.

[7] On 15 May 1989, the sixth defendant issued a letter of offer for the said land to Chan Yee Ming and registered the same under his name on 27 May 2003.

[8] On 27 May 2003, Hassnar Ebrahim ('Hassnar') (the first defendant in the original action) lodged a caveat on the said land on the basis that he had purchased the said land through a sales and purchase agreement, power of attorney, a will executed by SP and the contractor's agreement. He contended that he was always in possession of the said land after the letter of offer for the said land was handed to him by SP and the purchase price was paid. The said letter of offer was never lost by SP and that SP's SD was forged. Hassnar also contended that the forged SD is an act to defeat his legal and beneficial interest over the said land.

[9] However, by 2006, the said caveat had lapsed and Hassnar did not renew the same caveat. **A**

[10] On 27 May 2006, Chan Yee Ming transferred the said land to Lee Aik Kien @ Lee Aik Kian and Low Fook Cheong ('the plaintiffs'). Hence this action by the plaintiffs for possession of the said land and damages for trespass against the defendants in the original action. **B**

[11] Hassnar denied that he is a trespasser. He had thus, filed a counterclaim against all the seven defendants including SP for collusion, conspiracy to defraud or defeat his legal right, beneficial rights, and interest in the said land. **C**

[12] As it had come to pass, the High Court had allowed the plaintiffs' claim and also he had dismissed the counterclaim by Hassnar. Thus, this appeal by Hassnar to the Court of Appeal. **D**

THE APPEAL

[13] We heard this appeal on 16 November 2016. To avoid confusion, parties hereinafter will be referred to as they are named in the Court of Appeal. But before proceeding with the main appeal, we had dealt with a notice of motion ('encl 10a') that was filed by Hassnar, for an application to adduce further evidence namely: **E**

(a) the judgment in default of appearance ('JID') (O 13 r 6 of the Rules of Court 2012) entered against the first defendant in the counterclaim on 4 January 2016; **F**

(b) a news article published by the *Daily Express* under Vol 131 KK on Saturday 14 May 2016 under the heading/title of 'LAND BID CANCELLED' and the continuation under the heading ISU TANAH DI KG LAYON SELESAI: PEGAWAI DAERAH'; **G**

(c) the writ of summons dated 24 April 2012 together with the statement of claim dated 24 April 2012 of the suit No SDK-22–18/4 of 2012 between Lim Fong Tsin and 60 others and the Director of Lands and Surveys Department and State Government of Sabah ('Lim Fong Tsin's 2012 suit'); **H**

(d) the judgment after trial by the High Court judge dismissing the said Lim Fong Tsin's 2012 suit; **I**

(e) the appeal against the dismissal of the said Lim Fong Tsin's 2012 suit by Messrs Tan Pang Tsen & Co under Civil Appeal No S 01 (W)-122–04 of 2015 and its subsequent dismissal by the Court of Appeal;

(f) the sale and purchase agreement executed on 6 May 1985 between SP and Hassnar;

(g) Hassnar's notice to Ghazali bin Salleh NRIC 760825-12-5417, the biological son of late Salleh bin Khinson (the deceased person) demanding the same to apply to the Syariah Court to bequeath and or transfer ownership of a piece of land successfully applied by the deceased person vide PT 81081893 and or more particularly described as Lot No 50 Block 3 Luang Manis Small Holders Scheme Phase II district of Labuk and Sugut (Lot 50) which was sold to Hassnar; and

(h) the application by Ghazali bin Salleh NRIC 760825-12-5417, the biological son of the deceased person for an order that the ownership of the said Lot 50 be bequeathed and or transferred to Hassnar's daughter.

[14] After hearing submissions by all parties, we had dismissed encl 10a as we were not convinced by Hassnar that he had fulfilled the elements as required to be satisfied in the case of *Ladd v Marshall Ladd v Marshall* [1954] 1 WLR 1489, in relation to adducing of fresh evidence to be introduced in the hearing of an appeal. In other words, they were available during trial thereby negating qualification as fresh evidence. Indeed, one of them was sought to be adduced during trial but was rejected by the learned trial judge, against whose order there had been no appeal. We had also rejected the introduction of some of the intended documents as they were hearsay and irrelevant to this appeal.

[15] We then proceeded to hear parties submit on the main appeal. Based on the oral and written submissions of Hassnar before us, it was clear that the main issues were the same issues that were raised by him in the High Court before the learned trial judge. We would list down the said issues, as follows:

(a) whether SP had lawfully surrendered his letter of offer as per the SD;

(b) whether Hassnar had acquired a beneficial and legal interest over the said land from SP;

(c) whether Hassnar had the *locus standi* to maintain the counterclaim against the respondents in this appeal;

(d) whether Hassnar could challenge the sixth respondent's discretion under s 9 of the Sabah Land Ordinance to alienate land and failure to refer the matter to the Land Utilisation Committee;

(e) whether, on a balance of probabilities, Hassnar has proven collusion and conspiracy to defraud Hassnar as per the counterclaim;

(f) whether Hassnar's counterclaim is time-barred;

(g) whether the parties are entitled to aggravated damages, be it in the third and fourth respondents (as plaintiffs) in their claim in the original action, or Hassnar, being a plaintiff in his counterclaim.

OUR FINDINGS

[16] We had perused through the records of appeal and the submissions put forth by all parties before us. We would deal with the various issues as were raised by the appellant, Hassnar but as we had noted, some of the issues would overlap. Those issues will be dealt with in turn, though not necessarily in the sequence that they were laid out above.

First issue: Whether Hassnar could challenge the sixth respondent's discretion under s 9 of the Sabah Land Ordinance to alienate land and failure to refer the matter to the land utilisation committee

[17] Essentially, Hassnar was saying that failure on the part of the second respondent to refer his application to the land utilisation committee ought to render the second respondent's title to the land void. It could not be disputed that SP had surrendered the letter of offer back to the state authority when he could not fulfil the conditions attached to the offer in that he must plant the land with palm oil within three years from the date of the offer letter. Once the letter of offer was surrendered back, it was entirely left to the discretion of the Director of Lands and Surveys to then alienate the said land. The learned trial judge had referred to the case of *Lim Fong Tsin and 23 others v The Assistant Collector of Land & Ors* [1997] 1 LNS 7 for the proposition that subject to directions of the Minister, only the Director of Lands and Surveys had the discretion to alienate the state land and no one else, as envisaged by s 9 of the Sabah Land Ordinance (Cap 68). We therefore found no merit in the complaint raised by Hassnar on this score.

Second issue: Whether SP had lawfully surrendered his letter of offer as per the statutory declaration ('SD')

[18] The answer to this issue would revolve around the SD that was affirmed by SP when he wanted to surrender the letter of offer back to the state authority as he was not able to develop the land as required by the letter of offer. The SD was made to explain the fact that he had lost the original letter of offer. Hassnar had objected to this SD and adverted to the fact that the original letter of offer was not lost. But the learned trial judge had considered the evidence before him. Two things were clear to his mind. One, Hassnar did not lead evidence to prove his contention that the original letter of offer was not lost. He did not affirm any affidavit in opposition to rebut SP's SD which he was trying to impugn. Secondly, he made a finding of fact to the effect that he believed that SD12, one Sualim Sanan who had testified before him that he had attested the

SD of SP in his capacity as a second class magistrate. SD12 was at the material time a district officer. He had testified that SP had surrendered the letter of offer in respect of the land known as Lot 23 at the Luang Manis Phase 2 Smallholder's Scheme, the same land which Hassnar claimed to have an interest in. The crucial finding of fact can be seen at p 22 of the learned trial judge's GOJ where he said:

> And in the absence of any challenge by the deponent/declarant of that statutory declaration I must accept the truth of the contents stated therein. I cannot find anything in evidence as adduced during trial that Sulaiman Pong had retracted his earlier statutory declaration. I accept based on the documentary evidence and oral testimonies and in particular DW12, that Sulaiman Pong did lawfully surrendered his letter of offer for Lot 23 at the Luang Manis Phase 2 Smallholder's Scheme.

[19] We found no reason to disturb his finding. It was backed, as can by seen from the notes of proceedings, by both oral and documentary evidence.

Third issue: Whether, on a balance of probabilities, Hassnar has proven collusion and conspiracy to defraud Hassnar as per the counterclaim

[20] It was the contention of Hassnar as an allegation in his counterclaim that the respondents had colluded and conspired to defraud him and SP in relation to the land in question. Yet, Hassnar had also sued SP as the first defendant in his counterclaim. What appeared to be the situation in the collusion and conspiracy to defraud allegation has been whether the fifth to seventh respondents had conspired with the first to fourth respondents pursuant to a fraudulent scheme to defraud Hassnar's perceived right over the said land. It was the allegation by Hassnar that the SD that was affirmed by SP was a forged document that was fraudulently prepared by the first to seventh respondents to defeat his alleged right over the land. It is to be recalled that Hassnar had claimed that he had purchased the letter of offer from SP via a sale and purchase agreement between them. He had told the court that he would produce the said sale and purchase agreement as evidence to evince such a transaction did take place, thereby creating a beneficial interest over the said land in his favour. As it had come to pass, at the end of the trial Hassnar had not produced any sale and purchase agreement in court. Neither did he call SP to court to confirm that indeed such a transaction did take place. This was despite the fact that his own daughter did admit in court that she had met SP during the course of the duration of the trial of this case in the High court. Why was SP not called? Only Hassnar knew the answer to that question. As to the allegation of collusion and conspiracy to defraud, there was a dearth of evidence adduced by Hassnar in order to establish that factual circumstance. In the end, it had remained a mere allegation without more. The genesis of this allegation could be traced to the SD by SP to the effect that he had lost the letter of offer when he surrendered the offer back to the state authority as he was

unable to fulfil the mandatory pre-condition that was attached to the same before he register the offered land into his name. The learned trial judge made a strong finding of fact on this issue when he found that the said SD was attested by DW12 who as the district officer was also a second class magistrate and as such was competent to attest such a declaration by SP. More tellingly, the learned trial judge had attached more credence to the testimony of SD12 than that of Hassnar. The learned trial judge had also found as a fact that the fifth respondent who was the Assistant Collector of Revenue, Beluran did not collude with the second respondent in getting SP to surrender his letter of offer back to the state authority. In light of the evidence, as it then stood, the learned trial judge had concluded that Hassnar's lengthy submissions on this issue 'were full of conjectures, assumptions and assertions that are not actually in evidence' (see p 23 of his grounds of judgment). Having perused through the evidence, we saw no reason to depart from the learned trial judge's finding on this issue. In the case of *Ng Ah Ba & Ors v Ramanda Sdn Bhd* [1996] 1 MLJ 62 it was observed by the court that 'Practitioners must remember that taking a plea of fraud is a serious matter and that no such plea ought to be put on record in the absence of sufficient material in support'. Granted that the standard of proof required to be discharged by a plaintiff in a civil suit on an allegation for fraud is one on the balance of probabilities as decided by our apex court in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584 it was nevertheless clear to our minds that in this case, Hassnar had failed to prove the serious allegations of fraud and conspiracy to defraud, on the balance of probabilities. His allegations pertaining to fraud and conspiracy to defraud were altogether frivolous without any substance to back them up and were without merits.

Fourth issue: Whether Hassnar had acquired a beneficial and legal interest over the said land from SP

Fifth issue: Whether Hassnar had the locus standi to maintain the counterclaim against the respondents in this appeal

[21] With respect, these two issues can be dealt together as we were of the considered view that Hassnar could only maintain the counterclaim against the respondents if he had any interest in the said land, legal or beneficial. At the outset, we would refer to the decision of this court in the case of *Hon Chung Lip v Kwan Ngen Wah & Ors* [2012] 5 MLJ 356; [2012] 1 LNS 255 which put the issue in its proper perspective. This issue can be resolved by reference to s 88 of the Sabah Land Ordinance. Learned Justice Aziah Ali JCA (as Her Ladyship then was) had this to say on the effect of that section:

> It is not disputed that at the time the SPAs were executed the lands were still state land and titles to the lands had not been issued to the applicants. Based on s 88 and following the above mentioned authorities we find since the applicants were merely successful applicants at the time when the SPAs executed these applicants had no

A registered right or interest over the land which they could dispose to the appellant. Consequently the appellant acquired no legal right or interest over the land to entitle him to the declaratory order that he is the legal and beneficial owner of the 20 lots of land.

B **[22]** Based on the above decision in the *Hon Chung Lip v Kwan Ngen Wah*, SP was never a registered owner of the said land. He had no title that was good against the whole world to pass to Hassnar. In fact, having scrutinised the letter of offer that was given to SP, we found that it was a condition, inter alia, that was set therein that even after the land grant in respect of the said land had been C issued and registered in SP's name, he was prohibited from dealing with the said land in any way. In fact, there were two conditions which pertained to this prohibition as could be seen in *lampiran* A in the letter of offer to SP. We reproduce them here for convenience. Apart from the general exhortation for SP to abide by all directives coming from the Director of Lands and Surveys D and the Director of Agriculture, the letter of offer stated quite categorically as follows:

> Atas penerimaan tawaran ini dan pengeluaran geran, memajak- kecil dan memindahmilik geran ini adalah dilarang kecuali dengan kebenaran bertulis E daripada Pengarah Tanah.

[23] And for good measure, it was provided specifically:

> Tidak ada hak atau kuasa dibenarkan dengan pengeluaran sebuah geran boleh dipindah milik secara Perjanjian Surat Kuasa atau sebarang cara lain ... F

[24] Again the Director of Lands and Surveys could make an exception. But in this case, no exception from the Director of Lands and Surveys was ever obtained by SP. So, in light of the above, nothing that purported to transfer any G title, legal or beneficial to Hassnar could in law materialise. The prohibition was clearly stated in the letter of offer. There could be no two ways about it. Hassnar may have an action in contract against SP but against the other respondents, Hassnar had no iota or semblance of title upon which he could premise his right to sue them on. The *nemo dat quod non habet* rule applies in H full force, which reemphasises the legal proposition that 'no one gives what he does not have'. As a necessary corrollary to that, it has been articulated that the purchase of a *possession* who has no ownership right to it would entail a denial to the purchaser any ownership to the title. We had on a prior occasion to decide on a similar issue in the case of *Ling Ing Keat & Ors v Martina bt Pg* I *Ismail & Ors* [2017] 2 MLJ 763; [2017] 3 CLJ 149. In that case, there was a stipulation in the letter of offer which prohibited any dealing in relation to the letter of offer by the offeree. The panel in that *Ling Ing Keat* case had agreed with the learned trial judge in dismissing the plaintiff's claim and had occasion to make the following remark:

> ... It was done against public policy, bordering on illegality. In other words, none of the said defendants had the capacity in law, to deal with the said land as was expressly stated in the letter of offer. Two things were clear in respect of the letter of offer. First, it was just a letter of offer to alienate which the first to sixth defendants accepted on condition as stated as terms therein. Second, no title to the said land was issued at the time of issue of the letter of offer and neither was there a title issued to the said land at the date of the signing of the plaintiff's agreement on 19 August 2009. The title was only issued on 1 June 2012. In other words, the letter of offer prohibited expressly any dealing with the said land by any means, including by way of use of a power of attorney. As such, the plaintiff's agreement was void on that account.

[25] We noted that Hassnar's purported dealing with SP was tainted with a similar breach against the express embargo in the letter of offer to SP. It therefore had suffered from the same legal infirmity. In fact, the letter of offer to SP prohibit any dealing with the land even after a grant of title would have been issued to SP. What more, if no grant of title to the said land had been granted, as in this case. It must be recalled that SP had affirmed an SD to the effect that he was surrendering the offered land back to the state authority as he was unable to fulfil the pre-condition as stated in the letter of offer, to wit, to plant agricultural crop on the land within three years from the date of the letter of offer to SP. The position of SP in our instant appeal was no better than that of the plaintiffs' in the *Ling Ing Keat* case. In both cases, the holders of the letter of offer had nothing to offer to anybody in respect to the land, let alone to transfer any property in the land, beneficial or legal. As we had alluded to earlier in the above paragraphs, the *nemo dat* principle applied in full force. Essentially, SP could not, ever, pass any title to the said land to Hassnar, as SP had in law, nothing to pass to Hassnar. We must remark that this evidence flew across the face of the court from a perusal of the notes of proceedings as well as from the documentary evidence. It would be a remiss on our part if we chose to ignore them, in spite of their implications.

[26] So, the answer to the issues raised must be in the negative, namely, Hassnar had no legal nor beneficial interest in the said land and that as such, he had no locus standi to maintain the counterclaim against the respondents. The learned trial judge did not err when he had so found against Hassnar.

Sixth issue: Whether Hassnar's counterclaim is time-barred

[27] Whatever the other issues raised by Hassnar, they would come to naught if his counterclaim was time-barred. The learned trial judge had found that Hassnar's counterclaim was indeed time-barred. With regard to this issue, it was raised by the third and fourth respondents in their defence to Hassnar's counterclaim which was filed by Hassnar in 2013 purported in answer to the respondent's action for trespass against him on the said land. Items 73 and 74

of the Sabah Limitation Ordinance were invoked, where the limitation period was three years. In other words, Hassnar ought to have maintained an action against the third and fourth respondents within three years from the date of registration of ownership of the said land in the names of the said respondents. From the evidence adduced before the trial judge, it was established that Hassnar was aware that the land had been registered in the name of the second respondent. Hassnar had lodged a caveat on the land in 2003 but it had lapsed in 2006. He then lodged another caveat on the said land in 2008. Hassnar had submitted that he had delayed in filing an action against the third and fourth respondents because there was an alleged intentional delay on the part of the second, third and fourth respondents to take action against him. With respect, we could not accept that submission by Hassnar. His right to file an action to prosecute his purported right over the said land was not dependent on the respondents having first to sue him and then he would file a counterclaim in which he would then assert his right over the said land. His right, if any, over the said land was independent of anyone's right, including those of the respondents'. That being the case, we agreed, with respect to the learned counsel's submissions, for the third and fourth respondents that Hassnar did not have to wait until his clients had commenced action against Hassnar. Hassnar ought to have filed his action within three years from the time when he first realised that his purported right over the land had been threatened. Indeed, his lodgement of the first caveat in 2003 was a strong evidence pointing at that direction. Since he only prosecuted his right over the said land in 2013, we were in agreement that he was caught by limitation. Once limitation sets in, just like *rigor mortis*, the process is irreversible. It is now time for the mortician, so to speak, as the logical conclusion to the analogy.

Seventh issue: Whether the parties are entitled to aggravated damages, be it not pleaded in the third and fourth respondents in their claim in the original action, or Hassnar in his counterclaim

[28] This issue had centred on the contention that aggravated damages were not pleaded by the third and fourth respondents. The learned trial judge had awarded aggravated damages for the trespass committed by Hassnar having taken into account the fact that Hassnar had occupied the said land despite knowing as a fact that he did not own the land. The operative land law was clear. SP did not pass any title in the said land to Hassnar. As was evidently clear, SP had nothing to pass to Hassnar. As a result, Hassnar was clearly a trespasser on the said land as he did not have the prior permission from the present landowner respondents when he occupied the said land. Hassnar's conduct could only be described as recalcitrant to say the least. The learned trial judge took into account Hassnar's impugned conduct which he found to be unjustifiable. He then awarded aggravated damages and had justified his decision based on the case of *Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor* [2001] 6 MLJ 497 where it was said as follows:

> 'Aggravated damages' are part of general damages, they need not be specifically pleaded and it is sufficient for the plaintiffs to plead general damages in his statement of claim to enable him to claim aggravated damages.

[29] There was no authority cited in rebuttal of this statement of law. We were not inclined to disagree with the learned trial judge on his award for aggravated damages against Hassnar, which he had ordered to be assessed.

[30] It was clear to us that the learned trial judge had made the numerous findings of facts in the course of coming to his decision. The law on this is trite in that the appeal court must be slow in disturbing the findings of facts that have been arrived at by the trial judge who had the audio-visual advantage of observing the demeanour of the various witnesses who have appeared before him at the trial proceedings (see generally the Federal Court case of *Kluang Wood Products Sdn Bhd v Hong Leong Finance Bhd & Anor* [1999] 1 MLJ 193). Suffice to say here that we found no reason at all for us to disturb any of the findings of facts. In the Privy Council case of *Ludhiana Transport Syndicate & Anor v Chew Soo Lan & Anor* [1979] 2 MLJ 207b Lord Keith of Kinkel had occasion to say the following:

> An appeal court should be most wary of upsetting the findings of the trial judge, who has seen and heard the witnesses, upon the basis of theories of their own as to the general probabilities, which have not been fully tested at the trial. ... It is a strong step for an appeal court, which neither saw nor heard the witness, to hold that the trial judge was wrong to do so.

[31] The law on this is trite. In short, unless it can be shown to our satisfaction that the learned trial judge, with all the attendant advantages at his disposal, had made gross misfindings of facts as being against the weight of the evidence, we would not to be justified to take any step in the direction of upsetting his findings of facts. In this appeal, we had not been so satisfied.

[32] Neither had we found that the learned trial judge had been plainly wrong in coming to his decision. As such, there was no occasion for us to invoke our appellate power. In that regard, we need only to cite the case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 to remind ourselves of that solemn rule of practice that has almost crystallised into law and which practice has been religiously observed by our courts in exercising their appellate powers. The apex court in that *Lee Ing Chin & Ors v Gan Yook Chin & Anor* case had this to say:

> We also considered some of the categories in which appellate interference is warranted. We find it unnecessary to repeat what we said there. Suffice to say that we re-affirm the proposition that an appellate court will not generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision.

A CONCLUSION

[33] In the upshot therefore, after perusing the records of appeal and after considering the submissions from all parties, we had unanimously dismissed the appeal with costs of RM10,000 (inclusive of the costs for encl 10a) to each set of the respondents/ defendants, subject to payment of allocatur fees. We had also affirmed the decision of the learned High Court judge in toto.

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[34] We had so ordered.

C *Order accordingly.*

Reported by Ashok Kumar

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